LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 9 1957
JOHN T. FEY, Clerk

No. 439

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHIN BICK WAH, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	10
Conclusion	13

CITATIONS

Cases:

Arena v. *United States*, 226 F. 2d 227, certiorari denied, 350 U. S. 954	12
Banning v. *United States*, 130 F. 2d 330, certiorari denied, 317 U. S. 695	13
Davis v. *United States*, 107 Fed. 753	13
Hirabayashi v. *United States*, 320 U. S. 81	12
Lutwak v. *United States*, 344 U. S. 604	11
Pinkerton v. *United States*, 328 U. S. 640	12
United States v. *Myers*, 131 F. Supp. 525	12
United States v. *Otto*, 54 F. 2d 277	12

Statutes:

U. S. Code:

8 U. S. C. 1440	2
8 U. S. C. 1324	2
8 U. S. C. 1325	2
18 U. S. C. 1542	2
18 U. S. C. 1546	2, 3

Miscellaneous:

Wharton on Criminal Law, 12th ed., Section 1567	12

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 439

CHIN BICK WAH, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 630-637) is reported at 245 F. 2d 274.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1957 (R. 638). A petition for rehearing was denied on August 9, 1957 (R. 639). The petition for a writ of certiorari was filed on September 7, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction under a substantive count for making false representations in an application for an immigration visa.[1]

STATUTE INVOLVED

18 U.S.C. [1952 ed.] 1546 provides in pertinent part as follows:

* * * *

> Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement—
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged, along with defendant Fong Wy Sum, defendant Levy (an attorney), and other co-conspirators under count one of an indictment returned in the United States District Court for the Northern District of California, with a conspiracy to commit certain federal offenses,[2] and to defraud

---

[1] Petitioner also raises issues as to the conspiracy count which we do not deem properly in the case in view of the concurrent sentences.

[2] The pertinent provisions were 8 U.S.C. 1324; 8 U.S.C. 1325; 8 U.S.C. 1440; 18 U.S.C. 1542; 18 U.S.C. 1546.

the United States in the administration of its immigration laws (R. 3-12). Petitioner was charged under count six with a substantive violation of 18 U.S.C. 1546 (*supra*, p. 2) in making a false oath in application for an immigration visa, by stating that she was married to Jonathan K. Yee, that her passage to the United States was paid for by her husband, and that she intended to join her husband in the United States (R. 14-15). The jury found petitioner guilty under both counts one and six (R. 599),[3] and the court imposed concurrent sentences of imprisonment for one year (R. 17-18). On appeal (R. 21-22), petitioner's conviction was unanimously affirmed (R. 638).

Pertinent evidence adduced at the trial may be summarized as follows:

Defendant Fong Wy Sum (hereafter called Fong) married Gee King Yip in China and brought her to the United States in 1932 (R. 326-327). In 1939 Fong and his mother, Yee Shee, assisted Fong's first cousin, Jonathan K. Yee (hereafter called Jonathan) to enter the United States illegally from Hong Kong. When he arrived in San Francisco, a "paper father" had been produced for Jonathan to effect his entrance (R. 24-32). Fong considered Jonathan under obligation to him since he had assisted Jonathan in entering the United States (R. 209, 396-397).

Jonathan married an American born Chinese wo-

---

[3] Defendant Fong, at the conclusion of the trial, pleaded guilty to counts one, three, four, and five (R. 548-549). The jury disagreed as to Levy's guilt, and the court later ordered his acquittal (R. 622).

man named Jean Jow Yee (hereafter called Jean) in September 1947 (R. 58, [illegible]). Fong, who had previously unsuccessfully tried to bring petitioner, a Chinese native, to the United States as a student nurse (R. 39-40), suggested that Jonathan divorce Jean, take a trip to Hong Kong to marry petitioner, and bring petitioner to the United States so that she could become Fong's "number two" wife (R. 43-44, 366-367).

On May 11, 1951, Jonathan obtained a divorce after being referred to a Reno lawyer by attorney Levy, a close friend of Fong (R. 56, 59, 60, 377). Fong paid the expenses for this divorce (R. 57-58, 372). Upon his return to San Francisco, Jonathan continued to live at his old address with his former wife, Jean (R. 60, 379). The utility bills were changed to Jean's name alone at the suggestion of attorney Levy (R. 69-70, 384).

Immediately after the divorce, Fong prepared a passport application for Jonathan, in which Fong and Jonathan swore falsely that Jonathan was a United States citizen and that Fong was not related to Jonathan (R. 61-64; Govt. Ex. 5). When Jonathan's passport was issued in October 1951, Fong prepared the petition for petitioner's immigration visa and supporting documents. The future date of Jonathan's marriage to petitioner remained to be inserted in the petition (R. 70-73; Govt. Ex. 6). On October 26, 1951, Jonathan boarded an airplane for Hong Kong with a ticket purchased by Fong (R. 74-75, 242-243).

Upon his arrival in Hong Kong, Jonathan recog-

nized petitioner through the pictures which Fong had given ~~them~~ (R. 79-80). Jonathan sent a cablegram to Fong asking for his divorce paper and some money (R. 81-82). Shortly thereafter, petitioner told Jonathan that she had received money from Fong (R. 82-84). When Jonathan in petitioner's presence telephoned Jean from Hong Kong, petitioner asked if she could say hello to Jean to thank her for what she was doing (R. 403). In another telephone conversation from Hong Kong with Fong, Jonathan stated he would not go through with the marriage. Jonathan testified that Fong told him to "go ahead and go through with it and he would do anything for me"; and that Fong "finally convinced me, and also Chin Bick Wah [petitioner], you know." Immediately afterward, Jonathan discussed the matter with petitioner (R. 85).

On November 29, 1951, Jonathan went through a marriage ceremony with petitioner at Hong Kong. He testified he had no intention of a real marriage, but just "to marry [petitioner] to bring her over for Mr. Fong" (R. 175-176). Jonathan did not live with petitioner as her husband in Hong Kong (R. 91). When he returned to the United States in February 1952, he resumed his permanent residence with Jean (R. 87, 88, 403-404).

In March 1952, petitioner at Hong Kong executed an application for an immigration visa in which she stated that she ~~was married to Jonathan, that her~~ passage to the United States was paid for by her husband Jonathan, and that she intended to join her husband Jonathan in the United States. The state-

ments were charged as false in count six of the indictment, the substantive count under which petitioner was convicted (R. 14-15).

Following the granting of the visa, petitioner arrived in the United States on March 16, 1952, where she was met at the airport by Fong, his relatives, Jonathan, Jean (then six months' pregnant), and their daughter (R. 88, 405-407, 418). At a hotel in Oakland operated by petitioner's relatives, in compliance with Fong's directions, Jonathan signed the register, "Mr. and Mrs. Jonathan Yee." He then went with Jean and their child to their San Francisco home (R. 89-90). Fong remained at the hotel with petitioner (R. 412-413).

At first, petitioner refused to go through with the original plan. On May 31, 1952, she remarried Jonathan at Reno so that she could feel more secure about remaining in the United States (R. 96-97, 106). Jonathan returned immediately to San Francisco to live with Jean, and their second child was born in June 1952 (R. 97, 70). Just prior to the birth of the second child, Fong brought petitioner to visit Jean. Petitioner thanked Jean for "stepping aside and allowing her [petitioner] to come into the United States." Petitioner stated that she wanted at least a $20,000 home as security before going to live with Fong, and that if Jean would wait a little longer, she (petitioner) would "go to Reno and get a divorce from Jonathan" (R. 415-417).

Jonathan and Jean had been having marital difficulties (R. 97). In August 1952, Jonathan took his two children and went to live with petitioner

in Seattle for about one week (R. 98-99, 426-427). Then Jonathan telephoned Jean, begged forgiveness, and Jean went to Seattle to bring Jonathan, the children, and petitioner back home (R. 99-100, 428-431). Fong appeared and left with petitioner and her luggage (R. 439). From that time on, Jonathan lived with Jean (R. 102, 439).

On October 24, 1952, Fong obtained a Reno divorce from his wife, Gee Kee Yip (R. 339). In March 1953, Fong purchased a home in Oakland which he conveyed to petitioner as sole owner (R. 322; Govt. Ex. 22). The utilities were placed in Fong's name (R. 310-316), and about one month later Fong introduced petitioner as his wife to the neighbors (R. 317-321, 323-324).

On July 28, 1953, petitioner finally obtained a Reno divorce from Jonathan (R. 111; Govt. Ex. 11). On October 1, 1953, Fong married petitioner (R. 322; Govt. Ex. 21). In 1955, Jonathan went through another marriage ceremony with Jean (R. 102).

On December 21, 1955, petitioner gave certain statements under oath in an immigration proceeding (R. 187-195; Govt. Ex. 12). Petitioner swore that she and Jonathan had lived together continuously in the Fremont Hotel at Oakland until their trip to Seattle (R. 188). Responding to the question as to how many times her husband Fong had been married, she stated, "I only know of this marriage to me" (R. 189). Petitioner said that she did not remember having any conversations with Fong's first wife before she was divorced from Jonathan (R. 190).

The court admitted in evidence certain declara-

tions and statements by co-conspirators outside petitioner's presence in the last part of 1955 and in April 1956, a few days prior to the return of the indictment on April 11, 1956 (R. 16). These were concerned primarily with plans for denying all elements of the conspiracy and matching testimony to be given before the grand jury. Jean testified as to conversations with Yee Shee around Christmas 1955 (R. 442-443), with Ruby Yee (Fong's sister) on April 4, 1956 (R. 443-444), with Fong and Yee Shee at Jean's home on April 4, 1956 (R. 445-452),[4] with Fong and Yee Shee on April 5, 1956 (R. 452-455), and with Yee Shee on April 6, 1956 (R. 455-456). Jonathan testified as to conversations on April 5, 1956, with Yee Shee and Fong (R. 111-115), and on April 6, 1956, with Yee Shee (R. 115-117). In some instances, the court admitted the declaration without limitation of any kind (R. 442, 445); in others, "solely for the purpose of proving, if it does prove, the existence of a conspiracy" (R. 444, 453, 454); and in others, against the declarant alone, except for such weight as it might have to prove existence of the conspiracy (R. 518, 530-531, 113-114, 116).

In its final charge to the jury, the court instructed in part as follows (R. 571-573):

> The evidence of the acts or statements by any defendant which have been admitted against such defendant as admissions tending to show his or

[4] A government interpreter and an investigator, who overheard this April 4, 1956, conversation while hidden in an adjoining room, also testified as to it (R. 519-529; 532-538).

her guilt must not be considered as against any other defendant in the case. I have already given you some instructions along that line during the course of the trial. I want to caution you, however, particularly that when you are determining, as against any particular defendant, whether or not a conspiracy existed or whether he or she was a party to it, if one did exist, you must not consider and you must put out of your minds all evidence of acts done or declarations made by any co-conspirator out of the presence of the defendant whose guilt is under consideration, unless such acts or declarations were authorized by that defendant. In other words, in respect to the guilt of any particular defendant, the existence of the conspiracy charged in the indictment and that defendant's participation therein, must be established by evidence independent of the acts and declarations of any alleged co-conspirator done out of the presence of the defendant whose guilt is under consideration, unless the acts or declarations were authorized by such defendant.

Of course, once it has been shown beyond a reasonable doubt that any defendant was a party to the conspiracy, he or she is responsible and must be held accountable for every act or declaration of each member of the conspiracy done or made in furtherance of the conspiracy and while the conspiracy continues and before it is terminated. Once the conspiracy is established, and during the existence thereof, as between the parties to that conspiracy, an overt act of one conspirator in furtherance of the object of the conspiracy is an overt act of all the co-conspirtors without any new agreement directed speci-

fically to that act, and each co-conspirator is legally responsible for any act of a co-conspirator that follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original plan, and even though such defendant was not present at the time of the commission of such act.

On the other hand, after a conspiracy has come to an end, either by the accomplishment of its object, or by the parties abandoning it, evidence of the acts or declarations thereafter made by any of the co-conspirators can only be considered as against the person making the acts or declarations. The declaration or act of a conspirator not in the execution of the common design is not evidence against any of the parties other then the one making such declaration.

Any statement or declaration of an alleged co-conspirator, in order to be binding upon his alleged co-conspirator, must not only have been made during the existence of the conspiracy, but it must likewise have been made in furtherance of its object.

ARGUMENT

1. Petitioner contends that, since the Court of Appeals held that there was a failure of proof regarding the falsity of her representation that Jonathan paid for her passage to the United States (the second of three representations in the substantive count six), the conviction under this count must be reversed. The argument is that the jury might have convicted on a ground as to which there was insufficient evidence (Pet. 7-8).

We think, however, that the evidence was sufficient as to each of the three representations. Neither petitioner nor Jonathan intended a good faith marriage in Hong Kong, and her statement in the application for the immigration visa that she was married to him was clearly false. Cf. *Lutwak* v. *United States*, 344 U.S. 604, 611-612. The jury could, moreover, draw an inference that petitioner knew that Jonathan did not pay for her passage. Such an inference was reasonable from a consideration of the evidence in its entirety, and particularly from the fact that Jonathan did not pay for petitioner's living expenses in Hong Kong after the sham marriage; and that petitioner received money in Hong Kong from Fong (not Jonathan) after Jonathan's cablegram to Fong (see R. 82-84). Petitioner does not even challenge the evidence as to the third false representation, *i.e.*, that she intended to join her husband Jonathan in the United States. The Court of Appeals correctly found the evidence sufficient as to this, and the fact that Jonathan lived with his wife Jean all of the time, with the exception of the one week spent with petitioner in Seattle, amply supports this conclusion.

Even assuming *arguendo* that the evidence was sufficient only as to the third representation, the conviction under the substantive count six should still be affirmed. Unlike the decisions of this Court cited (Pet. 7), count six in the instant case charges one central misrepresentation by a spurious wife that she will join an alleged husband in the United States. Although three statements are charged, they are all part of the central misrepresentation; they are not

separate and unrelated, as in the cited cases. The charge having been laid in three separate assignments, proof of any one of them supports the conviction. *Cf. United States* v. *Otto*, 54 F. 2d 277, 279-280 (C.A. 2); *Arena* v. *United States*, 226 F. 2d 227, 236 (C.A. 9), certiorari denied, 350 U.S. 954; *United States* v. *Myers*, 131 F. Supp. 525, 528 (N.D. Cal.); Wharton on Criminal Law, 12th ed., Sec. 1567.

2. Since the sentences on both counts are concurrent, the conviction may be supported on the substantive count alone. *Cf. Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U. S. 640, 641-642, fn. 1. The contention that post-conspiracy declarations in April 1956 were improperly admitted against petitioner without a limiting instruction at the time, would thus not affect the judgment. It cannot be said that error as to the conspiracy count tainted the substantive count. As noted, *supra*, the judge very carefully emphasized that declarations by others must not be considered until the jury found by independent evidence participation in the conspiracy. Petitioner's participation in the conspiracy was shown by her misrepresentations under the substantive count, under which her guilt was "established by evidence independent of the acts and declarations of any alleged co-conspirator done out of [her] presence * * * " (court's charge, *supra*, p. 9).

Petitioner's contention that the court erred in admitting evidence as to Jonathan's illegal entry into the United States in 1939 with the assistance of Fong and Yee Shee by furnishing a "paper fathe " for

Jonathan is also not really in this case since it goes to the conspiracy count (Pet. 16-17, 9-10). This evidence was, in any event, admissible to show Jonathan's motive in going through a sham marriage for persons to whom he considered himself obligated. *Cf. Davis* v. *United States*, 107 Fed. 753, 756 (C. A. 6); *Banning* v. *United States*, 130 F. 2d 330, 337-338 (C.A. 6), certiorari denied 317 U. S. 695.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

OCTOBER 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1957 443053 490